II

(PETITIONER'S QUESTION Ib.) WHETHER APPELLATE COUNSEL WHO HAS RAISED ELEVEN NON-FRIVOLOUS APPELLATE ISSUES MAY BE RENDERED INEFFECTIVE FOR FAILURE TO RAISE AN ADDITIONAL ISSUE WITHOUT A FACTUAL DETERMINATION THAT THIS FAILURE WAS OTHER THAN A CONSIDERED DECISION ON THE PART OF APPELLATE COUNSEL.

Petitioner's position is that "[a]n evidentiary hearing should have been held as suggested by your petitioner in the motion for rehearing filed with the Florida Supreme Court to establish the factual reasons appellate counsel failed to brief the sequestration issue." Petition for Writ of Certiorari, p. 16. In the state's "Response to Petition for Extraordinary Relief and Writ of Habeas Corpus" filed in the Florida Supreme Court, App. 3., no request was made for an evidentiary hearing -- Petitioner believed and argued that the Florida Supreme Court should reject the ineffective assistance claims on the record, because the sequestration issue was only "a colorable issue" at the time of appeal. Id., p.6. It was only when respondent lost before the Florida Supreme Court that a request for an evidentiary hearing appeared in a Motion for Rehearing, which was denied without comment. Such a new matter cannot be raised for the first time in Florida in a motion for rehearing, Rule 9.330(a), Fla. Rules of App. Pro., it was neither properly before nor considered by the Florida Supreme Court, and, consequently, the issue is not a proper one for this Court's "review." Hargrave v. Wainwright, 804 F.2d 1182 (11th Cir. 1986).

In any event, no factual determination is required in this case as appellate counsel was ineffective whether the omission was an inadvertent one or a purported tactical decision. Petitioner must concede that counsel would have been ineffective if failure to raise this issue was because of inadvertent omission. Petitioner's remaining argument is that counsel may have made a "reasonable" tactical decision in not raising this issue because the Florida Supreme Court may have distinguished Raines on the facts. Petitioner would have this Court hold that it is

reasonable for counsel to assume or speculate away a meritorious claim based upon nothing more than a future possibility. Just as counsel cannot be found ineffective for failure to anticipate a change in the law, e.g., Reed v. Ross, ___ U.S. ____, 104 S. Ct. 2901, 2908-909 (1984) (citing cases), counsel must be found ineffective for gambling or speculating on a possible future ruling of the court. The law does not require clairvoyance of appellate counsel. The law requires that appellate counsel zealously represent appellants and that they put forth issues of merit on behalf of their clients. E.g., Alvord. Raines clearly and unequivocally states, and did at the time of appeal, that it is reversible Florida error to permit Florida jurors to separate after deliberation has begun. At the time of the trial (1981) and appeal (1983) no reason existed for counsel to believe this would not apply to Mr. Johnson. Failure to raise this issue can in no way be considered a "reasonable" tactical decision. Petitioner's guesses as to possible reasons why appellate counsel failed to raise this issue are unnecessary and irrelevant speculation.

III.

(PETITIONER'S QUESTION II.) WHETHER THE PREJUDICE PRONG OF STRICKLAND v. WASHINGTON IS SATISFIED WHERE APPELLATE COUNSEL FAILS TO RAISE A REVERSIBLE ISSUE THAT DOES NOT AFFECT THE TRUTH FINDING PROCESS OR A FUNDAMENTAL CONSTITUTIONAL QUESTION.

Petitioner's premise is flawed. The Florida Supreme Court made a finding, based on adequate and independent state law, that the issue sub judice does affect the truth finding process, in fact it goes to the heart of the reliability of jury deliberation. See Claim IV, infra. Separation of the jury during deliberation so taints the entire process that the Court was not confident that the result was fair. Id. The Court concluded that the entire trial was tainted.

The Florida Supreme Court has determined that the trial court committed reversible error under Florida law. A new appeal

is available whenever appellate counsel's deficiencies "compromis(e) the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome. . . ." Harris, supra. See also, Alvord, supra. The Supreme Court of the state of Florida has determined that the outcome of the appeal would have been different had this issue been briefed. Clearly, the Court was not convinced that the trial and appeal concluded in fair and correct results.

IV

THE DECISION OF THE FLORIDA SUPREME COURT RESTS ON AN ADEQUATE AND INDEPENDENT STATE GROUND

There is no federal constitutional right yet which requires that a jury be sequestered once deliberation begins in a capital case. However, the Florida Supreme Court has determined that this Florida rule goes to the heart of the truth finding process, contrary to Petitioner's assertion, and that its violation so poisons the process that the conviction cannot stand. The Florida Supreme Court ruling on this issue is based on state case and statutory law which constitute independent and adequate state grounds, thereby denying this Court jurisdiction to review the decision. Klinger v. Missouri, 13 Wall 257, 263 (1871); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1977); Ridgway v. Ridgway, 454 U.S. 46, 54 (1981); Michigan v. Long, 463 U.S. 1032 (1983).

"It is, of course, 'incumbent upon this Court . . . to ascertain for itself . . . whether the asserted non-federal ground independently and adequately supports the judgment.' "Long at 1039, citing Abie State Bank v. Bryan, 282 U.S. 765, 773 (1931):

> [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most

> reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. . . . If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

Long at 1040-41.

In Johnson, the Florida Supreme Court does not refer to or in any way specifically rely on federal constitutional provisions or federal case law. The Court's analysis focused entirely upon three state court decisions: Livingston v. State, 458 So. 2d 235 (Fla. 1984); Raines v. State, 65 So. 2d 588 (Fla. 1953), and Engle v. State, 438 So. 2d 803 (1983), cert. denied, 465 U.S. 1074 (1984). The Florida Supreme Court distinguished Engle from this case because in Engle the parties stipulated to the separation of the jurors after deliberation had begun. In this case counsel vigorously objected to the separation. The Florida Supreme Court concluded:

> Raines embodied the law at the time of Johnson's trial and appeal. Under Raines reversible error occurred during Johnson's trial. We find, therefore, that appellate counsel provided ineffective assistance by not bringing this issue to our attention.

After determining that appellate counsel failed to raise this issue, requiring reversal of the conviction, the Court determined that counsel was ineffective for this gross lack of representation.

In Raines, the court allowed the jurors to separate and go to their homes for the night after the case had been submitted to the jury for deliberations and the jury had deliberated for one and one-half hours. The jury reconvened in the morning, completed deliberations, and rendered a verdict convicting Raines and acquitting his co-defendant. On direct appeal, the Raines

court ruled that it was prejudicial error to permit the jurors to separate for the night once deliberations had begun.

Raines and thus this case is based on an interpretation of sections 919.01(1) and (2), Florida Statutes (1953), provisions which are now contained in Fla. R. Crim. P. 3.370 (1975). Raines indicates clearly and expressly that the Court's finding of error is based on bona fide separate, adequate, and independent state grounds:

> Whether or not separation of the jury for the night without instruction as to communicating with others and without the protection of bailiff was error, turns on the interpretation of the governing statutes cited in the forepart of the opinion.

Raines at 559. The Court concluded that this error was of such a magnitude that it constituted fundamental, reversible error, under Florida law:

> There is no showing in the way of evidence that defendant's rights were prejudiced but trials should not be conducted in a way that defendant has good reason for the belief that he was deprived of fundamental rights. The opportunity was open for tampering with the jury and the temptation to do so was such that we are not convinced that the appellant's trial was conducted with the degree of fairness and security that the bill of rights contemplates. A fifteen hour absence under no restraint whatever leaves too much room to question the bona fides of everything that took place during that time. . . . It imposes too great a burden on defendant to produce evidence of prejudice to his rights under such circumstances. We think this error calls for reversal.

Raines at 559-60 (emphasis added).

The Raines decision and the applicable Florida Statutes clearly defined the state of the law in Florida in 1981 - 1982, when the trial and appeal in the instant case took place. In addition to Florida, by 1981, "courts of a majority of states have held, either by statute, court rule, or the common law, that such a (jury) separation, especially in capital cases and where the defendant objects is prejudicial error. . . ." Livingston at 238. See e.g., Kimoktoak v. State, 578 P.2d 594 (Alaska 1978); Hughes v. State, 437 A.2d 559 (Del. 1981); Mason v. State, 239

Ga. 538, 238 S.E.2d 79 (1977); People v. Ritzert, 17 Ill. App.3d 791, 308 N.E.2d 636 (1974); Bales v. State, 418 N.E.2D 215 (Ind. 1981); Walker v. State, 410 N.E.2d 1190 (Ind. 1980); White v. Maxwell, 174 Ohio St. 186, 187 N.E.2d 878 (1963); Gibson v. State, 512 P.2d 1399 (Okla. Crim. App. 1973); Gonzalez v. State, 593 S.W. 2d 288 (Tenn. 1980); O'Neil v. State, 642 S.W. 2d 259 (Tex. Crim. App. 1982); State v. Smalls, 99 Wash.2d 755, 665 P.2d 384 (1983). Livingston, 458 So. 2d at 238 (citing cases).

Usually, when a state court decision appears to be interwoven or to rest primarily on federal law and the decision does not clearly and expressly state that it rests on alternate and independent state grounds, this Court will assume jurisdiction as "the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." Long at 1040-41. In this case, however, independent and adequate state grounds controlled the Florida Supreme Court's decision. Raines did not require a showing of prejudice as that Court concluded that this error is of such magnitude that it undermines the truth-finding function of a trial. To accept jurisdiction of this issue would require this Court to review and rule upon well-established Florida state law based upon interpretation of state statutes, one of the evils this Court sought to avoid in Long. Id. at 3475-76.

The Supreme Court of Florida has determined that failure to sequester the jury in a capital case once deliberations have begun is an error of great magnitude.

> The opportunity was open for tampering with the jury and the temptation to do so was such that we are not convinced that the appellant's trial was conducted with that degree of fairness and security that the bill of rights contemplates. . . .It imposes too great a burden on defendant to produce evidence of prejudice to his rights under such circumstances. We think this error calls for reversal.

Raines at 560 (emphasis added). Actual prejudice under these circumstances is "too great a burden". The Florida Supreme Court has determined that where the Raines situation arises, the

fairness and security of the entire Florida proceeding is called into question and the underlying conviction cannot stand, under Florida law.

CONCLUSION

Because none of the requirements of Rule 17 have been met, the petition for writ of certiorari should be denied.

Respectfully submitted,

LARRY HELM SPALDING
Capital Collateral Representative

*MARK EVAN OLIVE
Litigation Coordinator

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
225 West Jefferson Street
Tallahassee, FL 32301
(904) 487-4376

By: _____
Counsel for Respondent

*Counsel of Record

Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, TERM 1986

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections,

Petitioner,

v.

PAUL BEASLEY JOHNSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

CERTIFICATE OF SERVICE

I, MARK EVAN OLIVE, a member of the bar of this Court, hereby certify that on this 26th day of March 1987, a photocopy of the Motion In Opposition To Petition For Writ of Certiorari in this case was mailed, first class postage prepaid, to Robert J. Krauss, Assistant Attorney General, Office of the Attorney General, 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, FL 33602, all counsel for respondent, and all parties required to be served have been served.

MARK E. OLIVE
Litigation Coordinator

OFFICE OF CAPITAL COLLATERAL REPRESENTATIVE
225 West Jefferson Street
Tallahassee, FL 32301
(904) 487-437

Counsel for Respondent

APPENDIX 1

SUPREME COURT OF FLORIDA

NO. 68,319

PAUL BEASLEY JOHNSON, Petitioner,

v.

LOUIE L. WAINWRIGHT, Respondent.

[December 11, 1986]

PER CURIAM.

Paul Johnson, a Florida prisoner under sentence of death, petitions this Court for a writ of habeas corpus. We have jurisdiction. Art. V, §§3(b)(1), (9), Fla. Const. We grant the writ and remand for a new trial.

A jury convicted Johnson of, among other things, three counts of first-degree murder and recommended that he be sentenced to death. The trial court imposed three death sentences on Johnson, and we affirm his convictions and sentences. Johnson v. State, 438 So.2d 774 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984). The governor signed

Johnson's death warrant in January 1986, and Johnson subsequently filed the instant petition.

Johnson raises two claims in this petition. First, he argues that this Court should stay his execution because the United States Surpeme Court is currently considering the constitutionality of "death qualifying" juries in Lockhart v. McCree, docket no. 84-1865 (argued Jan. 13, 1986). We have previously found this issue to be without merit. Kennedy v. Wainwright, 483 So.2d 424 (Fla.), cert. denied, 107 S.Ct. 291 (1986). Moreover, after Johnson filed this petition, the Supreme Court decided Lockhart adversely to his position. 106 S.Ct. 1758 (1986).

As his second point, Johnson claims that he received ineffective assistance of appellate counsel. We granted the requested stay so that oral arugment could be presented on the second issue. After reviewing this

matter we conclude that relief is warranted.*

Several hours after the jury had begun its deliberations on Johnson's guilt or innocence, the trial court allowed the jury to separate for the night. Johnson's trial counsel objected to this separation and requested that the jury be sequestered overnight. The court denied both the objection and the request. The following morning trial counsel again objected to the procedure and moved for a mistrial. The court denied the motion. Appellate counsel did not raise this separation of the jury as an issue on appeal.

In making the instant claim of ineffective assistance of appellate counsel Johnson relies on Livingston v. State, 458 So.2d 235 (Fla. 1984), and Raines v. State, 65 So.2d 588 (Fla. 1953). In Livingston we held that

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* Johnson mentions five instances of ineffectiveness. Except for the jury sequestration issue, they are without merit.

"in a capital case, after the jury's deliberations have begun, the jury must be sequestered until it reaches a verdict or is discharged after being ultimately unable to do so." 458 So.2d at 239. Livingston relied on Raines, wherein this Court reversed for a new trial when the jury had been allowed to separate for fifteen hours after beginning to deliberate. Even though we did not file Livingston until a year after we affirmed Johnson's convictions and sentences, Raines embodied the law at the time of Johnson's trial and appeal. Under Raines reversible error occurred during Johnson's trial. We find, therefore, that appellate counsel provided ineffective assistance by not bringing this issue to our attention.

Relying on Engle v. State, 438 So.2d 803 (Fla. 1983), cert. denied, 465 U.S. 1074 (1984), the state argues that Johnson's appellate counsel provided effective

assistance because Raines is materially distinguishable from the instant case. In Engle the trial court had instructed the jury not to discuss the case and not to read, watch, or listen to any media reports on the trial; no such admonishment had been made in Raines. The key difference between Raines and the instant case on one hand and Engle on the other, however, is that in Engle the parties stipulated to the separation. Engle does not make Johnson's appellate counsel's performance effective. Additionally, we did not file our opinion in Engle until after we had affirmed Johnson's convictions and sentences.

If appellate counsel had brought the jury separation issue to our attention on appeal, a new trial would have been granted. Johnson seeks a new appeal in the instant petition and, in fact, has demonstrated his counsel's ineffectiveness. In this

instance however, a new appeal would be redundant because we acknowledge that reversible error occurred at trial. Therefore, we reverse Johnson's convictions, vacate his sentences, and direct that he be retried.

It is so ordered.

McDONALD, C.J., and ADKINS, BOYD, OVERTON, EHRLICH, SHAW AND BARKETT, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Original Proceeding - Habeas Corpus

Larry Helm Spalding, Office of the Capital Collateral Representative, Tallahassee, Florida,

for Petitioner

Jim Smith, Attorney General and Robert J. Krauss, Assistant Attorney General, Tampa, Florida,

for Respondent

APPENDIX 2

IN THE SUPREME COURT OF FLORIDA

PAUL B. JOHNSON, Petitioner, v. LOUIE L. WAINWRIGHT, Secretary Department of Corrections, State of Florida, Respondent.	)	Case No. _____ CAPITAL CASE Execution is Imminent, Scheduled for Tuesday, February 18, 1986, 7:00 A.M.

PETITION FOR EXTRAORDINARY RELIEF AND A WRIT OF HABEAS CORPUS AND A STAY OF EXECUTION

LARRY HELM SPALDING
Capital Collateral Representative

STEVEN H. MALONE
Assistant Capital Collateral Representative
Univ. of So. Fla. - Bayboro
140 7th Ave. So., RM COQ-216
St. Petersburg, FL 33701
(813) 893-9186

INTRODUCTION

This petition raises two claims. The first is that the process of capital jury death qualification, challenged by counsel at trial but *not* squarely raised on direct appeal, violates the sixth, eighth, and fourteenth amendments of the United States Constitution., This is a claim recently considered by this Court in Kennedy v. State, Case No. 68,264 (February 12, 1986), and which is presently pending before the United States Supreme Court in Lockhart v. McCree, Docket No. 84-1865. Because four jurors who could have fairly sat at the guilt/innocence phase were excluded from Mr. Johnson's jury, his case squarely presents the McCree issue.

The second claim is that Mr. Johnson received ineffective assistance of counsel on his direct appeal.

II. JURISDICTION

Claim I. This Court's jurisdiction derives from the Florida Constitution. Article V, Section 3(b)(1), (7), and (9) (1981), and Rule 9.030(a)(3), Fla. R. App. P. See also Rule 9.100, Fla. R. App. P. Relief under Fla. R. Cr. P. 3.850 is not available because the issue presented in this application was raised at trial and properly preserved but not fully raised on direct appeal of the judgment and sentence.

The writ of habeas corpus has been justly labelled "the Great Writ", because of its historic role as the guarantor of liberty. See generally Allison v. Baker, 152 Fla. 274, 11 So.2d 578 (1943); W. Duker, A Constitutional History of Habeas Corpus (1982). For this reason, both the State and federal constitutions explicitly provide for the writ. Fla. Const. Art. V, Section 3(b)(9); Art. I, Section 13; U.S. Const. Art. I, Section 9, clause 2. "Essentially, it is a writ of inquiry, and issued to test the reason or grounds of restraint or detention." Allison v. Baker, 11 So.2d at 579. Under our constitutional system, detention which violates the state or federal constitution is illegal, and reviewable by a writ of habeas corpus. The infringement of the sixth amendment guarantee of an

impartial jury is therefore properly cognizable in this court under Article V. We have applied for an original writ in this Court because Rule 3.850 appears to foreclose litigation of this claim in the trial court by a motion to vacate sentence and judgment. But the allocation of some habeas corpus jurisdiction to the trial court under Rule 3.850 hardly divests this Court of its constitutionally authorized jurisdiction, if the remedy under Rule 3.850 is unavailable. See United States v. Hayman, 342 U.S. 205 (1952) (interpreting 28 U.S.C. Section 2255, the model for Rule 3.850); Mitchell v. Wainwright, 155 So.2d 868, 870 (Fla. 1963) (enactment of Rule 3.850 does not suspend the writ of habeas corpus if it affords the same rights available under the writ).

Governor Graham signed Mr. Johnson's death warrant on January 16, 1986, three days after the United States Supreme Court heard oral argument on the constitutionality of the precise death qualification procedure used in Mr. Johnson's trial. If the United States Supreme Court affirms the Eighth Circuit, it will, in effect be pronouncing Mr. Johnson's conviction and sentence unconstitutional. This pronouncement, of course, will have little meaning unless Mr. Johnson's execution is stayed. We fully recognize that McCree is not yet "new law". A decision affirming the judgment of the Eighth Circuit, however, would clearly satisfy this court's definition of new law which may be invoked in a collateral challenge to a conviction. Witt v. State, 387 So.2d 922 (Fla. 1980).

It would be possible, of course, for Mr. Johnson simply to apply directly to the federal courts for habeas corpus relief. We believe that it would be proper for this Court to reconsider the question Mr. Johnson has presented because unique features of Florida's capital sentencing procedure are bound up in the application of McCree to this case and because we can present a new study confirming the effects of death qualification on juries in this State. The Florida provision for judicial override of the jury's sentencing verdict, the Florida requirement of a

majority recommendation, rather than a unanimous decision, and this Court's decisions concerning nonreliance on residual doubts of the defendant's guilt as a mitigating circumstance, alter the balance in Florida between the interests of the defendant in a fair jury and the state's interest in death qualification.

Claim II. This Court has jurisdiction over claims of ineffective counsel on appeal. Art. V, Section 3(b)(1), (9), Fla. Const. Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985).

III. FACTUAL BASIS FOR RELIEF

Claim I. Trial counsel filed a pretrial motion objecting to the selection of a death qualified jury (R. 2312-15; Tr. 2115 ff.), which was denied. (Tr. 2125). Specifically, trial counsel noted that excluding jurors under Witherspoon created an unconstitutionally "biased" jury, not fairly drawn from a cross-section of the community. (Tr. 2314). Counsel also requested individual and sequestered voir dire (R. 2308-09; Tr. 2128 ff.), and renewed that motion at the start of jury empanelment. (Tr. 12). Both motions were denied. (Tr. 13).

Four prospective jurors were excluded because of their attitudes on capital punishment, despite their proven ability to be impartial at the guilt/innocence phase of trial. (Tr. 238-41, 249-51, 311-13, 314-15). At the conclusion of jury selection, trial counsel renewed his objection to the removal for cause of the four death scrupled jurors. (Tr. 411). Trial counsel's motion for new trial reiterated his objections to the death qualification of Mr. Johnson's jury. (R. 3443-45).

In his Initial Brief on direct appeal, Mr. Johnson's counsel challenged the exclusion of juror Patsy McWhorter for cause. (Issue 5 at 28), arguing that her disqualification violated Witherspoon. Counsel quoted extensively from the colloquy between trial counsel and the juror, which demonstrated that the juror

> would be a fair and impartial juror in the guilt or innocence phase of the trial, but would probably be unable to vote for a death sentence in the penalty phase. (Initial Brief at 29,

quoting Tr. 239-240.) In its Brief, the State identified and presented to this Court the very issue which trial counsel had argued, but which appellate counsel overlooked. The State asserted that Mr. Johnson had lost the right to contest Ms. McWhorter's exclusion on the grounds asserted on direct appeal, because at trial counsel's contemporaneous objection had been based upon a different theory entirely (Grigsby). (Answer Br. at 17). The State cited this Court's previous decisions in Riley v. State, ___ So.2d ___ (19), and Gafford v. State, ___ So.2d ___ (Fla.), as authority for the rule that jurors could, indeed, be excluded, even if they could be entirely fair in deciding guilt or innocence. (Answer Br. note 6 at 17). In essence, the State's argument was that the only basis upon which counsel could challenge the disqualification of the juror for cause on direct appeal was the precise objection stated at trial. The state quoted counsel:

> Mr. Sharer: OK, Do you think, mam, if you did not have to set at the penalty portion and have to recommend, if you were on the penalty, do you think if you were asked to sit at the trial part where guilt or innocence is determined, do you think you could?
>
> Mr. Sharer: You Honor, I would ask that Mrs. McWhorter not be excused for cause because she could sit as a fair juror possibly at the guilt or innocence portion. If she was, uh, did not if she sat, could not sit fairly at the penalty portion, a substitute juror could be sat to take her place.
>
> Mr. Sharer: Please the court, I would like to have my objection on the record to that challenge for cause and renew that motion I did make pretrial regarding that type of juror who only has a problem at the penalty phase and not the guilt phase.

Tr. 240-241.

Appellate counsel ignored this signal; although he considered it important to challenge the disqualification of Juror McWhorter, he made no mention of Riley in his Reply Brief.

This Court, in ruling on the direct appeal, found "After studying this prospective juror's responses to the questions asked on voir dire... that she unequivocally stated her

opposition to imposing the death penalty. The trial court, therefore, properly excused her." ____ So.2d at _____.

Claim II. Petitioner submits that there are at least three viable issues which were properly preserved below and which appellate counsel unreasonably failed to raise in the proceedings before this Court:

1. Appellate counsel unreasonably failed to argue that the trial court's refusal to sequester the jury, once deliberations on guilt/innocence had begun, was reversible error. Even if this Court finds such conduct was not ineffective, Petitioner contends this Court should address the issue as a denial of a fundamental constitutional right.

2. Appellate counsel unreasonably failed to clearly argue that the exclusion of four jurors during the death qualification voir dire violates Mr. Johnson's sixth, eighth and fourteenth amendment rights, and that therefore petitioner's judgments and sentences cannot stand. In the event the court finds such omission was not ineffective, Petitioner contends that this Grigsby error is fundamental error.

3. Appellate counsel unreasonably failed to argue that the admission of testimony of James Smith, to the effect that petitioner expressed an intent to commit future, violent crimes, constituted reversible error and was highly prejudicial at both the guilt-innocence and the penalty phases of petitioner's trial.

4. & 5. Appellate counsel failed to fully argue two clear instructional errors at penalty phase which unconstitutionally misled the jury.

IV. RELIEF SOUGHT

Claim I. Mr. Johnson seeks immediate relief, in the form of a stay of execution, in order to preserve this Court's jurisdiction over his constitutional claims. The issue raised in this application is currently before the United States Supreme Court. Lockhart v. McCree, Docket No. 84-1865. During argument, on January 13, 1986, the Supreme Court Justices specifically inquired into the implications of Lockhart for the State of

Florida, presumably because in Florida judges, not juries, have ultimate responsibility for sentencing decisions. In Kennedy v. Wainwright, this Court voted 4 - 3 to deny a stay in a case which was in the same jurisdictional posture as is Mr. Johnson. The United States Supreme Court subsequently unanimously stayed Mr. Kennedy's execution, based upon McCree. The United States Supreme Court has granted stays of execution in other cases raising the issue in Lockhart, including one case the procedural posture of which is similar to Mr. Johnson's. Celestine v. Blackburn, stay granted, 106 S.Ct. 31 (1985). Celestine raised a challenge to the death qualification of his trial jury on direct appeal. State v. Celestine, 443 So.2d 1091 (La. 1983). The United States Supreme Court denied certiorari. 105 S.Ct. 224 (1984). Mr. Celestine raised the issue in a petition for a writ of habeas corpus in the United States District Court. The Fifth Circuit denied relief. Celestine v. Blackburn, 750 F.2d 3531 (5th C. 1984). The Supreme Court granted the application for a stay. 106 S.Ct. 31 (September 25, 1985). Subsequently, relying on Celestine, the Fifth Circuit granted a stay of execution in a case presenting the same question. Rault v. Louisiana, ____ F.2d ____, Case No. 85-3281 (5th Cir. October 7, 1985).

The United States Supreme Court has also stayed execution in two cases presenting the Lockhart issue in successive petitions for a writ of habeas corpus. Bowden v. Kemp, 106 S.Ct. 213 (1985); Moore v. Blackburn, A-261 (October 4, 1985). This Court likewise has jurisdiction to stay Mr. Johnson's execution, Fla. Constitution, Art. V, Section 3(b)(7). The importance of the question, the probability of a landmark decision by the United States Supreme Court in the next few months, and Mr. Johnson's clear entitlement to relief should the Supreme Court affirm the Eighth Circuit in Lockhart, suggest that a stay is necessary and appropriate. Furthermore, since the issue presented in this application concerns the impartiality of the fact-finder, it calls into question the very reliability of the verdict and sentence of death.

Following sufficient opportunity to review the complex social science data at issue in Lockhart, this Court should reconsider whether death qualification is constitutional in Florida. Mr. Johnson requests an evidentiary hearing, at which he would present many of the studies which are in the Lockhart record. If this Court concludes that any evidentiary hearing is needed before it may decide the merits of Mr. Johnson's claim, it should remand this case to the trial court for such a hearing. It may well be, however, that the United States Supreme Court's decision will determine, as a matter of law, how much injury a criminal defendant suffers as a result of death qualification. It will only remain for this Court to decide how much weight to attach to the State's countervailing interest, which, as we show, is negligible because of the sentencing procedure used in Florida but not in Arkansas.

This Court, after full consideration of the record, should set aside Mr. Johnson's conviction, and order that he be given a new trial.

Claim II. A stay of execution is required so that this Court may give deliberate and careful consideration to Mr. Johnson's constitutional claims. Mr. Johnson's appellate counsel was ineffective, in violation of the sixth, eighth, and fourteenth amendments, and he is entitled to a new appeal.

V. BASIS FOR RELIEF

A. FIRST GROUND FOR RELIEF

On February 12, 1986, this Court, by a vote of 4 to 3, denied a stay of execution in the case of Edward Kennedy. Kennedy, whose jury was death qualified, argued that a stay should be granted because the United States Supreme Court will soon decide Lockhart v. McCree, 106 S. Ct. 59 (1985) (granting certiorari in Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985) (en banc), which will resolve whether the process of Witherspoon death qualification violates the Constitution.

Following this Court's 4 - 3 denial of a stay, Kennedy

applied for a stay pending certiorari in the United States Supreme Court. The only issue raised in the application was the Grigsby claim. The Supreme Court unanimously granted the stay.

The stay in Kennedy is only the most recent example of the Supreme Court's determination that no death-sentenced inmates raising the Grigsby claim shall be executed while the Grigsby issue is unresolved. Only one week prior to the unanimous stay in Kennedy, the Court had unanimously stayed the execution of a North Carolina inmate. Rooks v. Woodard, ___ U.S. ___ (February 10, 1986), and in Bowden v. Kemp, 774 F.2d 1494 (11th Cir. 1985), the Eleventh Circuit had denied a stay, finding:

> BY THE COURT:
>
> The United States District Court for the Middle District of Georgia has dismissed petitioner's successive petition for the writ of habeas corpus and denied petitioner a certificate of probable cause to appeal. Presently pending is his petition for a certificate of probable cause and for his stay of execution pending appeal.
>
> The petition presents only one issue involved in Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985), cert. granted sub nom Lockhart v. McCree, ____ U.S. ____, 106 S. Ct. ____, 87 L. Ed. 2d ____ (Oct. 7, 1985). In this Circuit, prior to and since Grigsby, we have rejected that contention. See Jenkins v. Wainwright, 763 F.2d 1390 (11th Cir. 1985), Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985), and Smith v. Balkcom, 660 F.2d 573, 575-84 (5th Cir. Unit B 1981), modified, 671 F.2d 858 (5th Cir. Unit B 1981), cert. denied, 459 U.S. 882, 103 S. Ct. 181, 74 L. Ed. 2d 148.
>
> Since granting certiorari in Grigsby, the Court has stayed executions in Celestine v. Blackburn, ____ U.S. ____, 106 S. Ct. 31, 87 L. Ed. 2d ____ (1985), and Moore v. Blackburn, 774 F.2d 97 (1985). It is asserted that these two stays by the High Court were granted because of the Grigsby issue involved in each of them; the orders granting those stays do not sufficiently advise us of the basis for them.
>
> Under the precedent binding us in this Circuit, the District Judge's dismissal of the successive petition is correct and the petitions for certificate of probable cause and stay of execution are without merit. Were we to grant CPC and reach the merits of the proposed appeal on consideration of the petition for stay of execution, See Barefoot v. Estelle, 463 U.S. 880, 103 S. Ct. 3383, 77 L.Ed.2d 1090 (1983), we should be bound to affirm the district court. The grant of the

> writ of certiorari in Grigsby is no authority to the contrary; any implications to be drawn therefrom may be discerned by application to the Supreme Court.
>
> The petition for certificate of probable cause is DENIED.
>
> The petition for stay of execution is DENIED.

Id. at 1494. The Supreme Court unanimously granted a stay. Bowden v. Kemp, 106 S. Ct. 213 (1985). The Court has granted stays in at least five additional cases raising the Grigsby issue in a variety of procedural postures. See Celestine v. Blackburn;, stay granted (October 4, 1985) (successive petition) (Grigsby claim raised on direct appeal, cert. denied); Kenley v. Missouri, Docket No. 85-5533, stay granted (October 8, 1985); Guzmon v. Texas, 697 S.W. 2d 404 ;(Tex. Cr. App. 1985), stay granted 54 U.S.L.W. 3391 (December 6, 1985); Gilmore v. Missouri, 697 S.W. 2d 172 (Mo. 1985) stay granted 54 U.S.L.W. 3423 (December 24, 1985). See also Rault v. Louisiana, _____ F.2d _____, Case No. 85-3281 slip op. (5th Cir. October 7, 1985) (denying rehearing but granting stay of execution in light of Moore and Celestine).

Mr. Johnson submits that the State courts should stay his execution, because the proceedings in state court should be seen as the "main event, so to speak, rather than a tryout on the road for what will later be the determinative federal habeas hearing." Wainwright v. Sykes, 433 U.S. 77, 91 (1977). The United States Supreme Court has in recent years evinced a deep concern for preserving state autonomy within our federal structure and for enhancing the proceedings in State court as decisive and portentous events. See, e.g., Barefoot v. Estelle, 103 S. Ct. 3383 (1983); Marshall v. Lonberger, 103 S. Ct. 843 (1983); Stone v. Powell, 428 U.S. 465 (1976); Engle v. Isaac, 102 S. Ct. 1558 (1982); Rose v. Lundy, 102 S. Ct. 1198 (1982).

Mr. Johnson will not here repeat the social science studies and testimony at issue in Grigsby/McCree and detailed in Kennedy. The overwhelming evidence discussed in the Grigsby/McCree opinions and in the Kennedy pleadings demonstrate what many

experienced lawyers and judges have long believed: juries from which those who would not be able to vote for the death penalty have been removed are more likely to convict -- based on the same evidence -- than an ordinary criminal jury. The legal question posed in this application, and which is before the United States Supreme Court in Lockhart, is a narrow one. May the State exclude jurors who will be fair in the guilt phase of a bifurcated trial, simply because in the separate, sentencing phase, they would never vote to inflict the death penalty?

We do not contend that jurors whose opinions about capital punishment will influence their decisions about the defendant's guilt or innocence should serve on capital juries. This case involves only those jurors, sometimes described as "automatic life imprisonment" jurors, who are qualified to serve in the guilt phase of a capital trial, but who are excluded for the convenience of the State, so that additional alternate jurors are not required for the sentencing phase of the trial. We present our analysis of this issue in four parts: the defendant's unquestioned constitutional right to a trial by a fair and impartial jury; the defendant's right to a jury representing a fair cross section of the community; the state's interest in death qualification; and whether the state's interest is weighty enough to overcome the defendant's constitutional right.

a. Death Qualified Juries Are Not Impartial

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . . ." In Duncan v. Louisiana, 391 U.S. 145 (1968), decided only two weeks before Witherspoon, the Supreme Court held that this provision was applicable to the States through the due process clause of the fourteenth amendment.

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. . . . If the defendant preferred the common sense

> judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or a group of judges.

Id. at 156. Article I of the Florida Constitution, Section 22, provides: "The right of trial by jury shall be secure to all and remain inviolate. The qualifications and number of jurors, not fewer than six, shall be fixed by law."

Because the right to trial by jury is inextricably linked to ideals of democracy and representation, "the proper functioning of the jury system, and indeed our democracy itself, requires that the jury be a 'body truly representative of the community and not the organ of any special group.'" Glasser v. United States, 315 U.S. 60, 86 (1942). "The constitutional standard of fairness requires that a defendant have 'a panel of impartial "indifferent" jurors.'" Murphy v. Florida, 421 U.S. 794, 799 (1975). Death qualification, like exposure to pretrial publicity, produces a jury which is predisposed to convict. See Irvin v. Dowd, 366 U.S. 717 (1961); Sheppard v. Maxwell, 384 U.S. 333 (1966); Patton v. Yount, ___ U.S. ___, 104 S.Ct. 2885 (1984). Unlike pretrial publicity, however, the predisposition resulting from death qualification is easily avoided, because it is entirely within the control of the court.

Because overwhelming evidence shows that death qualified juries are not impartial, death qualification necessarily violates the Constitution unless the State's interest in the procedure overcomes the defendant's constitutional right.

b. Death Qualification Violates the "Fair Cross Section" Requirement

In addition to the fundamental requirement that a trial jury be fair and impartial, it must also be representative of the community. "[T]he fair cross-section requirement [is] . . . fundamental to the jury trial guaranteed by the Sixth Amendment. . . ." Taylor v. Louisiana, 419 U.S. 522, 530 (1975). In Duren

v. Missouri, 439 U.S. 357, 364 (1979), the Court explained:

> In order to establish a prima facie violation of the fair-cross section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to the systematic exclusion of this group in the jury selection process.

The Eighth Circuit applied this standard:

> There is no functional difference between excluding a particular group of eligible citizens from the 'jury wheels, pools of names, panels or venires from which juries are drawn' and systematically excluding them from sitting on a petit jury. Duren and Taylor forbid the former explicitly and can be read to forbid the latter implicitly. Duren, 439 U.S. at 363-67; Taylor, 419 U.S. at 526-31. The result is the same in either case: a distinct group of the citizenry is prevented from being considered for service on petit juries.

Grigsby v. Mabry, 758 F.2d note 7 at 230. The court found that the group of jurors who are excluded by death qualification is distinctive and sizeable; that the representation of such persons on venires is not fair and reasonable; and that they are systematically excluded by the death qualification process. Grigsby, 758 F.2d at 229.

The representation of a cross section of the community helps to make jury verdicts more reliable, since without such a cross section, the jury is deprived of "a perspective on human events that may have unsuspected importance in any case that may be presented." Peters v. Kiff, 407 U.S. 493, 503-4 (1972) (plurality opinion). Experimental data on death qualification confirms the relevance of this principle here. Cowan, Thompson and Ellsworth found that juries which included excludable jurors remembered the evidence more accurately than did members of juries which included only death qualified jurors. The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of deliberation, 8 L. & Hum. Behav. at 73. The authors concluded, "We expect that the superiority of mixed juries is also a function of the likelihood that errors of fact are more

likely to be corrected when there is a wide range of viewpoints and a higher level of controversy." Id. at 76. An unrepresentative jury cannot reflect "the common sense of the community." Ballew v. Georgia, 435 U.S. at 232. Death qualification impairs the ability of the jury to carry out this vital function and denies the defendant his constitutional right to a representative jury.

c. The State's Only Interest in Death Qualification is Fiscal and Administrative

The State's only interest in a criminal trial is in seeing justice done, not in obtaining a conviction or a particular sentence. Berger v. United States, 295 U.S. 78 (1935). For this reason, the State has no legitimate claim of entitlement to a death qualified jury because it is more favorable to the prosecution than ordinary criminal juries. Yet this is the reasoning which lies behind the contention voiced in the Petitioner's brief in Lockhart, and earlier in Spinkellink, that juries which are not death qualified may be "defendant prone." Discussing this position, the Eighth Circuit observed that this is "the wrong issue. The issue is not whether non-death-qualified jurors are acquittal prone or death-qualified jurors are conviction-prone. The real issue is whether a death qualified jury is more prone to convict than the juries used in noncapital criminal cases -- juries which include the full spectrum of attitudes and perspectives regarding capital punishment. The fact that the state charges a defendant with a capital crime should not cause it to obtain a jury more prone to convict than if it had charged the defendant with a noncapital offense." Grigsby v. Mabry, 758 F.2d at 2419 n. 31. The only meaningful standard of measurement of jury impartiality is an ordinary criminal trial jury; the evidence shows that compared to such a jury, death qualified juries are biased in favor of the prosecution. Since this kind of bias undermines the reliability of jury verdicts, and creates a risk of erroneous convictions, the State has no interest in obtaining a death qualified jury, unless the

administrative advantages of having a single jury panel decide both guilt and penalty is greater than the constitutional deficiencies arising from the demonstrated bias and unreliability of death qualified juries.

(1). The Florida Statutory Scheme Does Not Require Death Qualification.

The first, and perhaps the best, measure of the State's interest is the statutory scheme which governs jury selection in this State. Fla. Stat. Section 913.13 provides that "[a] juror who has beliefs which preclude him from finding a defendant guilty of an offense punishable by death shall not be qualified as a juror in a capital case." This section does not authorize the disqualification of jurors who can find a defendant guilty if the prosecution carries its burden, but who will not vote to inflict a death sentence. The Florida legislature, therefore, has not proclaimed any interest in the death qualification procedure followed in this or any other case. The only other relevant statutory authority is Fla. Stat. Section 913.03(10), which authorizes the removal of jurors whose "state of mind regarding the defendant, the case, the person alleged to have been injured by the offense charged, or the person on whose complaint the prosecution was instituted that will prevent him from acting with impartiality. . . ." But reliance on this provision to justify the exclusion of jurors who will be fair to both sides in the guilt phase but not in the penalty phase begs the question. The problem of impartiality in the penalty phase arises only if the same jury must decide both guilt or innocence and penalty. See Winick, Witherspoon in Florida: Reflections on the Challenge for Cause of Jurors in Capital Cases in a State in Which the Judge Makes the Sentencing Decision, 37 U. Miami L. Rev. 825, 835-40 (1983).

Fla. Stat. Section 921.141(1) provides, in relevant part:

> Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge

oon as practicable.
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east fourteen cases for resentencing
State, 294 So.2d 305 (1974); Lamadline
la. 1974); Miller v. State, 332 So.2d 65
State, 330 So.2d 137 (1974); Elledge v.
1977); Maggard v. State, 399 So. 2d 973
State, 425 So.2d 521 (Fla. 1982); Perri v.
6 (Fla. 1983); Trawick v. State, 473 So.2d
State, 439 So.2d 840 (Fla. 1983); Patten v. State,
(Fla. 1984); Hill v. State, 477 So.2d 553 (1985);
e, ___ So.2d ___, Case No. 65,378 (Fla. Nov. 25,

ang in Section 921.141(1) precludes a trial judge from, for
seating alternate jurors who attended the guilt phase of
ial on the jury during the sentencing phase in place of
s who would not consider imposing the death penalty. The
stitution of a small number of alternates would be simple,
ficient, and fair. The jury would thus be impartial in both
the guilt and sentencing phases. Under current practice, the
trial jury is not impartial in the critical determination of the
defendant's guilt or innocence. Impartiality in the sentencing
phase is bought too dearly when the cost is impartiality in the
more important determination of guilt or innocence.
This is especially true in Florida for two reasons. First,
the verdict in the sentencing phase need not be unanimous. Even
if the sentencing jury were less than impartial, it might still
reach the same result by a smaller majority. Second, the jury's
sentencing verdict is only advisory. We discuss this point in
greater detail below. In general, the determination of guilt or
innocence is more important because the cost of an erroneous

conviction is surely far higher than the social cost of an erroneous sentence of life imprisonment. See 4 W. Blackstone, Commentaries on the Laws of England 358 (better that ten guilty men go free than one innocent person be convicted).

(2). The Trial Judge's Power to Override the Jury's Recommendation Makes Death Qualification Before Trial Unnecessary.

Florida law gives the trial judge the final decision on sentencing in a capital case. Fla. Stat. Section 921.141(3). The jury's recommendation receives "great weight" in the judge's final decision, Tedder v. State, 322 So.2d 908 (Fla. 1975), but judges retain, and not infrequently exercise, the power to override jury recommendations of life imprisonment or death. See Mello and Robson, Judge over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases, 13 Fla. St. Univ. L. Rev. 31 (1985).

> Because the trial judge decides sentence without being bound by a jury recommendation, he may impose capital punishment in an appropriate case even if 'automatic life imprisonment' jurors remain on the capital jury and vote, as inevitably they will, for life imprisonment. Indeed, whatever guidance the judge is provided by the jury's recommendation on the life or death question is still provided by a jury whose members include 'automatic life imprisonment' jurors. Since voir dire questioning will identify those jurors as being 'automatic life imprisonment' jurors, the judge will be aware of the number of such jurors sitting on the capital jury and will be able to give appropriate weight to the jury's advisory vote on sentence.

Winick, supra, 37 U. Miami L. Rev. at 852 (footnotes omitted).

In sum, Florida's statutory procedure already provides ample safeguards against "erroneous" failures to impose a death sentence. For this reason, the State's interest in an impartial jury in the sentencing phase is insubstantial by comparison to the defendant's constitutional right to have an impartial jury decide the question of guilt or innocence.

(3). This Court's decisions preclude reliance on residual doubts about guilt in mitigation of sentence.

The United States Court of Appeals for the Eleventh Circuit, in Smith v. Balkcom, supra, 660 F.2d at 580, concluded that --

regardless of the strength of the evidence that demonstrates that death qualified juries were predisposed in favor of the prosecution -- death qualification was not constitutional error because "[t]here is a potential benefit to a defendant . . . which would be lost were the jury which found guilt discharged and a new jury empaneled to decide punishment. The members of the jury which heard the evidence in the guilt phase may believe that guilt has been proven to the exclusion of a reasonable doubt, "and yet, some genuine doubt exists. . . . The juror entertaining doubt which does not rise to reasonable doubt can be expected to resist those who would impose the . . . penalty of death. . . ." Id. This Court has repeatedly held that the sentencing judge should give no weight to jury recommendations based upon such lingering doubts about the defendant's guilt. In Buford v. State, 403 So.2d 943 (Fla. 1981), this Court wrote:

> A convicted defendant cannot be 'a little bit guilty.' It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy.

Id. at 953. Accord Burr v. State, 466 So.2d 1051, 1054 (Fla. 1985); Sireci v. State, 399 So.2d 964, 972 (Fla. 1981). While we do not endorse this rule, the holding distinguishes Florida's capital sentencing scheme from the Georgia case discussed in Smith v. Balkcom. It is simply inconsistent to justify a system which impairs the defendant of a fair jury in the guilt phase of a trial on the basis of a "benefit" to which -- as a matter of state law -- a defendant in a Florida capital trial is not entitled.

Of course, it would not be necessary to empanel a new jury at all since in Florida the judge, not the jury, makes the final sentencing decision, and could give less weight to a jury recommendation influenced by jurors who would never vote to impose a death sentence. Nor would this be necessary if the court simply empaneled additional alternate jurors as substitutes for jurors who were not qualified to serve in the penalty phase. Since none of the reasons which ordinarily support death

qualification are applicable to Florida's sentencing process, a defendant's constitutional right to trial by an impartial jury surely must prevail in the balance.

The only other justification the state might offer is the administrative and fiscal burden of selecting additional jurors for the sentencing phase. Even if such fiscal considerations could play a proper role in this Court's constitutional analysis, they are insufficient to overcome the defendant's constitutional rights. These expenses are slight by comparison to those incurred by, for example, a change of venue. Furthermore, they would be partially, if not entirely, offset by a reduction in the length of voir dire before trial,and by the increased accuracy of jury verdicts, which would reduce the costs of appellate review of capital cases.

d. The Right to Trial by an Impartial Jury Outweighs the State's Interest in Death Qualification before Trial.

"It is, of course, settled that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal 'organized to convict.'" Witherspoon, 391 U.S. at 521. Yet this is precisely what happens when we entrust the determination of guilt or innocence to a death qualified jury. Death qualification undermines the fundamental premise of our jury system: that the fairest trial is one before a group fairly and randomly chosen from the entire community, which mirrors that community in its values and its diversity. Without compelling reasons, the state may not abridge this right. A similar compromise between the state's interest and the right to a trial by a jury representing a fair cross section of the community is presented in challenges to a prosecutor's racially motivated use of peremptory challenges. The Supreme Court has agreed to consider this issue this Term as well. Batson v. Kentucky, Docket No. 84-6263, cert. granted, 85 L.Ed 476 (1985). Florida's capital sentencing process makes death qualification before trial completely unnecessary.

B. SECOND GROUND FOR RELIEF

The appellate-level right to counsel rests on the sixth amendment right to effective assistance of counsel. Evitts v. Lucey, ___ U.S. ___, 105 S. Ct. 830 (1985). Appellate counsel must function as "an active advocate on behalf of his client," Anders v. California, 386 U.S. 738 (1967), who must receive "expert professional . . . assistance . . . [which is] necessary in a legal system governed by complex rules and procedure . . ." Lucey, 105 S.Ct. 830, n. 6. An indigent, as well as "the rich man, who appeals as of right, [must] enjoy[] the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf . . ." Douglas v. California, 372 U.S. 353, 358 (1965) (equal protection right to counsel on appeal).

The process due appellant is not simply an appeal with representation by "a person who happens to be a lawyer . . ." Lucey, 105 S.Ct. at 835 (quoting Strickland v. Washington, 104 S.Ct. 2052 (1984). The attorney must act as a "champion on appeal," Douglas, 372 U.S. at 356, not "amicus curiae". Anders, 386 U.S. at 744.

These are not merely arcane jurisprudential precepts: "Lawyers in criminal cases are necessities, not luxuries." United States v. Cronic, 80 L.Ed. 657 , 664 (1984). Counsel is crucial, to "meet the adversary presentation of the prosecution." Lucey, 105 S.Ct. 830, 835, n.6. Unless counsel requires the "prosecution's case to survive the crucible of meaningful adversarial testing," Cronic, 80 L.Ed. at 666, this Court cannot easily perform its assigned function, as the leader of Florida's judiciary, to ensure "that the guilty be convicted and the innocent go free." Lucey, 105 S.Ct. 830, 835 (citations omitted). "'Truth,' Lord Eldon said, 'is best discovered by powerful statements on both sides of the question.'" Cronic, 80 L.Ed. at 657 (citing the quote from Kaufman, Does the Judge Have a Right To Qualified Counsel, 61 ABAJ 569, 569 (1975)).

Effective counsel does not leave an appellate court with

"the cold record which it must review without the help of an advocate." Anders, 386 U.S. at 745. Neither may counsel play the role of "a mere friend of the court assisting in a detached evaluation of the appellant's claim." Lucey, 105 S.Ct. at 835. Counsel must "affirmatively promote his client's position before the court . . . to induce the court to pursue all the more vigorously its own review because of the ready references not only to record, but also to the legal authorities as furnished it by counsel." Anders, 386 U.S. at 745; see also, Mylar v. Alabama, 671 F.2d 1299, 1301 (11th Cir. 1982) ("Unquestionably a brief containing legal authority and analysis assists an appellate court in providing a more thorough deliberation of an appellant's case.").

"The mere fact that [this Court is] obligated to review the record for errors cannot be considered a substitute for the legal reasoning and authority typically provided by counsel." Id., at 1302. In addition, the advocacy of counsel must be timely, not after oral arguments or on rehearing. "An appellate court conducts its most in-depth and complete review of a case during the direct appeal. A petition for rehearing typically receives a more summary consideration . . . Accordingly, the duties of an 'active advocate' mandate that appellate counsel assert his [or her] client's position at the most opportune time." Id.

This Court has long protected the right of indigents to effective appellate representation. In Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984), this Court granted a new appeal where counsel's "representation of appeal fell below an acceptable standard." Subsequently, upon Mr. Barclay's new appellate record, briefing, and argument, this Court reversed Barclay's death sentence, and ordered that a life sentence be imposed. More recently, this Court recognized that a new appeal is available whenever appellate counsel's deficiencies cause a prejudicial impact on the petitioner by "compromising the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome . . ." Harris v.

Wainwright, ___ So.2d ___ (Fla. No. 66 23, June 13, 1985, slip at 3).

Appellant neither can be denied appellate counsel as "a sacrifice of [an] unarmed prisoner[] to gladiators," Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975), cert. denied 423 U.S. 876 (1975), nor can he be provided an attorney whose ineffectiveness makes it "difficult to distinguish [the appellant's] . . . situation from that of someone who had no counsel at all." Lucey, 105 S.Ct. 830, 855, n.6. Nominal representation on an appeal as of right . . . does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all." Id. at 836. Counsel may not waive his client's defense, Id. at n. 6, and be considered effective.

While there is no federal constitutional right to an appeal generally, Jones v. Barnes, 103 S.Ct. 3308 (1983), the Eighth Amendment demands meaningful appellate review in capital cases. To ensure that death sentences are imposed in an evenhanded, rational, and consistent manner, as opposed to wantonly and freakishly, prompt and automatic appellate review is require. Gregg v. Georgia, 428 U.S. 153 (1976) (opinion of Justices Stewart, Powell, and Stevens); Proffitt v. Florida, 428 U.S. 242 (1976). If effective assistance of appellate counsel is a constitutional imperative in cases in which the constitution does not even require an appeal, it follows a fortiori that enhanced effectiveness is required when the appeal is required by the Eighth Amendment.

Counsel on direct appeal rendered ineffective assistance of counsel in failing to raise three meritorious claims.

1. Permitting the jury to separate during deliberations.

The case of Paul Johnson was one in which there was a great deal of pre-trial publicity. The publicity was such that a defense Motion for Change of Venue [Tr. 2287-94] was granted in (Order transferring venue to Lake County, Florida [Tr. 2339]

Amended Order [Tr. 2364]).

During the deliberation of the jury at guilt phase of this capital trial, the Court permitted the jury to separate and go home. [Tr. 1598-9]. Counsel objected to this procedure and the objection was overruled. (Tr. 1599-1600). When the jury returned after going home overnight, counsel again objected to the procedure, and moved for a mistrial. [Tr. 1603]. The jury returned with its verdict less than two hours later.

On September 21, 1981 at 3:58 P.M. the jurors, after having been instructed by the Court, retired to deliberate the guilt/innocence of Paul Johnson [Tr. 1596]. At 9:04 P.M. the jury returned to the courtroom and at 9:06 P.M. the Court excused the jury for the evening indicating they return at 9:00 A.M. the following day. [Tr. 1597-99]. A request for sequestration of the jury overnight was made by defense counsel before the Court instructed and dismissed the jury. [Tr. 1599]. The request was denied by the Court. [Tr. 1600].

On September 22, 1981 at 9:00 A.M., before the jury returned to the courtroom, defense counsel lodged a Motion for Mistrial on the ground that the jury had not been sequestered. The Motion was denied [Tr. 1603]. Defense counsel had previously moved at the onset of the trial for sequestration of the jury for the entire trial. [Tr. 9]. An additional Motion for sequestration during voir dire was made because of the massive amount of pre-trial publicity. [Tr. 2128-32].

The law in Florida is quite clear on the issue of jury sequestration during the deliberation phase of a capital trial. In Livingston v. State, 458 So.2d 235 (Fla. 1984) the Florida Supreme Court related:

> We therefore find that the trial court erred and that the error prejudiced appellant's right to a fair trial. We hold that in a capital case, after the jury's deliberations have begun, the jury must be sequestered until it reaches a verdict or is discharged after being ultimately unable to do so. A separation of the jurors after commencement of deliberations will generally be grounds for a mistrial, save for exceptional circumstances of emergency, accident, or other special necessity. Such a

> strict rule appears to be necessary in order to keep the attention of the jurors properly focused and concentrated on their deliberations.

In so ruling the Court relied on the decision and reasoning of Raines v. State, 65 So.2d 558 (Fla. 1953). In Raines, the prevailing law in Florida at the time of this trial in 1981, the court allowed the jurors to separate and go to their homes for the night after they had begun deliberations. The case had been fully submitted to the jury and the jury had deliberated for one and one-half hours prior to separation. The Raines court ruled that it was prejudicial error to let the jurors separate for the one night.

It is crucial to note that the Court in Raines was not concerned with whether counsel had objected nor with any requirement that actual prejudice be shown to obtain relief.

> There was no objection raised when the jury was dispersed, nor were counsel consulted. There is no showing in the way of evidence that defendant's rights were prejudiced but trials should not be conducted in a way that defendant has good reason for the belief that he was deprived of fundamental rights. The opportunity was open for tampering with the jury and the temptation to do so was such that we are not convinced that the appellant's trial was conducted with that degree of fairness and security that the bill of rights contemplates. A fifteen hours absence under no restraint whatever leaves too much room to question the bona fides of everything that took place during that time . . . It imposes too great a burden on the defendant to produce evidence of prejudice to his rights under such circumstances. We think this error calls for reversal.

65 So.2d at 559-60.

Raines was based on an interpretation of Sections 919.01(1) and (2), Florida Statutes (1953) provisions which are now contained in Fla.R.Crim.Pro. 3.370 (1975). As analyzed by the Court in Livingston and Raines the statutes and rule do not contemplate that jurors should separate during deliberations. In addition, the Court noted that Section 918.06, Florida Statutes (1979) which provides the court with discretion to either sequester the jury or allow them to separate when they leave the jury box does not specifically allow for a sequestration during

deliberations. The Court found "there is no specific authority by statute or rule for the action of the trial court judge."

The Livingston Court highlighted the danger in allowing jurors to disperse after beginning deliberations by referring to the reasoning and language of the Raines Court.

> "...to allow the jurors to disperse for a weekend after they have begun their deliberations raises serious questions about their ability to reconvene and resume deliberations completely free from outside influences. Even in the trial of a noncapital felony, the separation of the jury prior to the rendering of the verdict has been recognized to be an irregularity which may call for the granting of a new trial. Smith v. State, 40 Fl.a 203, 23 So. 854 (1898). It should be noted that Smith, a noncapital case, was decided before the advent of electronic communications and entertainment in the home on a mass basis.
>
> In the instant case, the court gave admonitions to the jurors before the weekend recess and examined them prior to the resumption of deliberations on Monday. However, the issue in this case is whether the weekend recess in the midst of deliberations rendered the jurors so susceptible to the operation of improper influences as to have been reversible error even with admonitions before and voir dire after the recess. The Raines decision recognized that some situations carry such an inherent danger of improper influence that courts should remedy the error without requiring the accused to show that any such improper influences actually operated upon or affected the jury. More recent decisions have properly applied this principle and illustrate its continued validity. Armstrong v. State, 426 So.2d 1173 (Fla. 5th DCA 1983); McDermott v. State, 383 So.2d 712 (Fla. 3d DCA 1980); Kennick v. State, 107 So.2d 59 (Fla. 1st DCA 1958).

The Raines decision and the applicable Florida Statutes clearly defined the state of the law in Florida in 1981, when the trial in the instant case took place. In addition to Florida, several other jurisdictions had also, by 1981, established through statute, court rule and common law that a jury separation, "especially in capital cases and where the defendant objects, is prejudicial error. . . ." See e.g., Kimoktoak v. State, 578 P.2d 594 (Alaska 1978); Hughes v. State, 437 A.2d 559 (Del. 1981); Mason v. State, 239 Ga. 538, 238 S.E.2d 79 (1977); People v. Ritzert, 17 Ill.App.3d 791, 308 N.E.2d 636 (1974); Bales v. State, 418 N.E.2d 215 (Ind. 1981); Walker v. state, 410

N.E.2d 1190 (Ind. 1980); White v. Maxwell, 174 Ohio St. 186, 187 N.E.2d 878 (1963); Gibson v. State, 512 P.2d 1399 (Okla.Crim.App.1973); Gonzalez v. State, 593 S.W.2d 288 (tenn. 1980); O'Neil v. State, 642 S.W.2d 259 (Tex.Crim.App.1982); State v. Smalls, 99 Wash. 2d 755, 665 P.2d 384 (1983). Livingston, 458 So.2d at 238 (citing cases).

The Livingston Court, in addition to utilizing the language of Raines, also adopted the reasoning of the Supreme Court of Washington:

> "Jurors might be subjected to any number of prejudicial influences whenever the jury is allowed to separate. A juror allowed to return to his home overnight might be prejudiced by any of the myriad influences on his life. who can say how a juror might be influenced by contact with his family and friends, or exposure to the various news and entertainment media during an evening at home?
>
> In our opinion, jurors are especially sensitive to prejudicial influence during deliberations. While still hearing evidence, it is probably easier for jurors to keep an open mind. Moreover, the impact of potentially prejudicial influences will be dissipated by subsequent evidence, the arguments, and instructions. But when the jurors have heard all the evidence, and have been focused onto the issues before them by the arguments of the parties and instructions, the potential for prejudice increases substantially.
>
> ...A chance remark by a juror's spouse or a program watched on television during the juror's 12 hours at home would have more immediacy than the evidence. There is a very real possibility that the juror's recollection of the evidence or perception of it might be distorted by such influences received subsequent to the conclusion of the evidence.
>
> Of course, it is usually impossible to determine whether such influences actually prejudice a juror against the defendant in a particular case. The juror himself may well be unaware of the subtle influences which affect his decision. For this reason, admonition and instruction of the jury is probably ineffective in ameliorating the prejudicial effects of separation during the deliberations. For this reason also, the use of juror affidavits to prove a probability of prejudice is of dubious value; a juror cannot swear to being prejudiced by influences of which he is unaware.
>
> State v. Smalls, 99 Wash.2d at 765, 665 P.2d at 390-91.

Livingston, 458 So.2d at 238, 39.

There is no question but that the right of defendant to a fair trial, a trial by an impartial jury, is a fundamental right guaranteed by the Sixth Amendment to the United States Constitution and Article I, section 16 of the Florida Constitution. Mr. Johnson was denied these rights during his trial. This was a highly publicized case with television cameras in the courtroom at all times. Defense counsel timely objected to the jury separation by requesting sequestration specifically on the advice of appellate counsel who was present at the time, although the Raines decision did not even require this. [See Aff., Ex.]. Notwithstanding motions for sequestration, the court ignored the danger of separation. The court cited no emergency, accident or other special necessity that would have, at least, given some justification for separation. The court's only reason for the separation was that it did not want to inconvenience the jurors. This is no justification for depriving Mr. Johnson of his right to a fair trial and impartial jury. Mr. Johnson was deprived of his rights under both the United States and Florida Constitutions and should be granted a new trial.

Appellate counsel's utter failure to address this properly preserved issue on direct appeal, especially in light of this Court's later decision in Livingston, demonstrates both his ineffectiveness as counsel and the highly prejudicial nature of this omission. The error is of such fundamental proportion that the Court should address the issue directly even if it finds appellate counsel was not ineffective for omitting it.

2. Death Qualification of Capital Jurors

Mr. Johnson's trial counsel challenges the death qualification of this jury by pretrial motion and specifically objected to the exclusion of jurors on the precise ground well before the Supreme Court in Lockhart v. McCree.

Appellate counsel's failure to discuss this issue on direct appeal, despite trial counsel's preservation of the record below, constitutes ineffective assistance of appellate counsel. This Court should stay Petitioner's execution pending the Supreme

Court's ruling in Lockhart.

3. Admission of James Smith's testimony re: Petitioner's violent "intentions"

Appellate counsel was also ineffective in failing to raise on appeal the trial court's admission of certain testimony provided by witness James Smith during Petitioner Johnson's trial, although the issue of admissibility had been raised and properly preserved below.

Witness Smith was an inmate in the same institution as Mr. Johnson during January, February, and March, 1981. [Tr. 1108]. During that period of time, with the encouragement of agents of the state, [Tr. 1121 ff. passim], Smith engaged Mr. Johnson in several conversations concerning the homicides involved herein. [Tr. 1120]. After testifying to the substance of conversations the witness claimed to have had with Mr. Johnson directly concerning the three homicide victims, Smith was questioned as follows:

> Q. Did he mention going to the hospital or what he would do if he could go to the hospital?
> A. Yes.
> Q. What?

[Tr. 1117]. At that point, Defendant's trial counsel objected on the grounds of relevancy; the Court overruled the objection. [Tr. 1118].

The question was restated with the following response:

> Q. What did he say about going to the hospital?
> A. If they sent a little cop, he knew he could take his gun, if he took that big son-of-a-bitch's gun in Lakeland, and he would be home free then.
>
> . . . .
>
> Q. What did he say about the hospital?
> A. He said if they sent a little deputy with him to take him to the hospital, if he could take that big dude's gun in Lakeland, he could take that little one's and he'd be home free.

[Tr. 1118].

Defense counsel asked to make a motion outside the presence of the jury; the Court deferred argument until after cross-examination of Smith. [Tr. 1119]. At the conclusion of Smith's

testimony, defense counsel moved for a mistrial:

> MR. SHEARER: Yes, Your Honor, I'd like to make a Motion for Mistrial at this time on the ground that Mr. James Smith was permitted over objection to testify to alleged statements of the defendant Paul Beasley Johnson about some allegations as far as what he was going to do or would like to do regarding criminally violent offenses wholly unrelated to the charge in this case.
>
> To remind the Court, Mr. Smith was allowed to testify that Mr. Johnson supposedly said if he ever got to the hospital, he would take another deputy's gun away from him, try to escape, something of this nature. This is evidence or testimony allegedly that the Defendant made statements regarding another or subsequent offense regarding escape, assault on a police officer, resisting arrest, totally irrelevant to the case at bar and prejudicial to the defense and automatic grounds for a mistrial.

[Tr. 1132].

The Court denied the motion for mistrial. [Tr. 1132]. Despite trial counsel's preservation of this error below, appellate counsel failed to raise or argue the matter on direct appeal.

The admission of Smith's testimony as to Mr. Johnson's alleged intention to commit other, future violent crimes constitutes fundamental error. In the first place, the testimony in question, while highly prejudicial, is simply irrelevant. F.S. 90.401 defines relevant evidence as "evidence tending to prove or dispute a material fact." What Mr. Johnson said about his future intentions -- which in fact were never carried out nor criminally charged -- is simply irrelevant to the criminal prosecution in this cause. However, the introduction of such evidence was extremely prejudicial to Mr. Johnson in that it tended to show a general predilection for violence and for criminal behavior quite outside the scope of the indictment. In addition, such testimony could not fail to color the jury's deliberations during the penalty phase of Mr. Johnson's trial, because it tended to impugn Mr. Johnson's character in general terms, and because it suggested that any penalty short of a death sentence might result in an effort to escape.

Secondly, the testimony in question is directly analogous to

"Williams Rule" evidence, in that it involved allegations of "other criminal activity" introduced improperly in this case, solely for the purpose of showing Mr. Johnson's bad character, propensity for violent crime, and intention to escape.

In the usual case, if Williams Rule evidence is properly admissible as to collateral crimes because of a strong element of similarity between the crime charged and the collateral crime, a limiting instruction is sought and given to minimize the prejudicial effect of the collateral evidence. In this case, where the "crimes" discussed never happened, and were totally irrelevant in all respects, trial counsel did all he could to preserve the error, by moving for a mistrial. Had appellate counsel raised the issue and argued it, the conviction would have been reversed. Rivers v. State, 425 So.2d 101 (1st DCA 1982); Townsend v. State, 420 So.2d 615, (Fla. 9th DCA 1982); Dixon v. State, 426 So.2d 1358 (Fla. 2d DCA 1983).

Panzavecchia v. Wainwright, 658 F.2d 337 (5th Cir. 1981), held that, where the jury heard constant reference to the defendant's criminal past without any limiting instruction to apply such evidence only to a particular charge, such lack of instruction was prejudicial error, and

> rose to such a level as to make the petitioner's trial fundamentally unfair and in violation of the Fourteenth Amendment.65

Panzavecchia, 658 F.2d at 341 (emphasis added). This same passage was emphasized and quoted in United States v. Silva, 745 F.2d 840 (4th Cir. 1984). Both Panzavecchia and Silva deal with improper joinder of offenses, rising to the level of constitutional error. In Silva, the court further stated that the prejudicial effect of introduction of a defendant's prior conviction can be avoided through the proper use of a limiting instruction. In Silva, the trial judge repeatedly charged the jury to consider a particular conviction only for the purposes of one charge. No such instructions, which might have alleviated the prejudicial effect, were possible in this case.

Florida Statute 90.404(2)(b)(2) specifically states that "[a]fter the close of the evidence, the jury shall be instructed on the limited purpose for which the [Williams Rule] evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information."

To allow evidence of crimes not included in the indictment would permit the state to fail to meet the preliminary requirements of this statute. This rule was announced in order to prevent abuse in presenting testimony. See Fla. Stat. 90.404, Sponsor's Notes. In Mr. Johnson's case, permitting testimony concerning his alleged intentions to commit other, future violent crimes -- never charged in any indictment or information because they never occurred -- is an even more egregious error. Appellate counsel's failure to raise this potentially reversible issue on direct appeal therefore constitutes ineffectiveness and must be redressed by this Court.

CONCLUSION

Obviously, this court cannot search every record on appeal in every capital case for error. Where the points omitted would have, as we have demonstrated, resulted in reversal, appellate counsel's failure reaches the level of constitutionally ineffective assistance of counsel, and Petitioner's convictions and sentences must be vacated. Even if this Court finds no ineffectiveness as to Point 1, the fundamental nature of the error requires reversal.

Respectfully submitted,

LARRY HELM SPALDING
Capital Collateral Representative

STEVEN H. MALONE
Assistant Capital Collateral Representative
Univ. of So. Fla. - Bayboro
140 7th Ave. So., RM COQ-216
St. Petersburg, FL 33701
(813) 893-9186

By: _____
Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to Mr. Robert J. Crauss, Assistant Attorney General, Office of the Attorney General, Suite 804, Park Trammell Building, 1313 Tampa Street, Tampa, FL 33602, this _____ day of February, 1986.

_____
Attorney

Supreme Court of Florida

MONDAY, FEBRUARY 17, 1986

PAUL BEASLEY JOHNSON,

Petitioner,

v. CASE NO. 68,319

LOUIE L. WAINWRIGHT, etc.,

Respondent.

* * * * * * * * * * * * * * * * *

The Application for Stay of Execution is granted and the execution of Paul Beasley Johnson is hereby stayed pending further order of this Court.

A True Copy

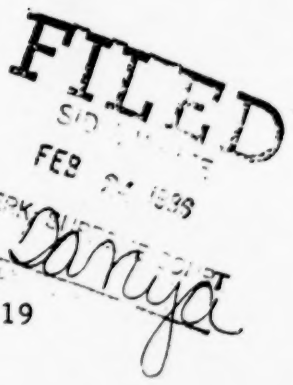
TEST:

Sid J. White
Clerk, Supreme Court

TC
cc: Steven H. Malone, Esquire
Robert J. Krauss, Esquire
Hon. Bob Graham, Governor
Superintendent Richard Dugger

APPENDIX 3

IN THE SUPREME COURT OF FLORIDA



PAUL B. JOHNSON,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida,

Respondent.

Case No. 68,319

RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF AND A WRIT OF HABEAS CORPUS

JIM SMITH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR RESPONDENT

A. THE GRIGSBY CLAIM

Petitioner relies on the pendency of Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985), cert. granted sub nom Lockhart v. McCree, 38 Cr. L. 4030 in support of his request for a stay of execution and a new sentencing hearing. The question presented to the court in Lockhart is the constitutionality of excluding from a capital jury those persons who could not inpose a sentence of death under any circumstances. Respondent respectfully submits this challenge to the capital sentencing procedure must fail when viewed in light of the Supreme Court's earlier decisions in both Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and Wainwright v. Witt, 469 U.S. ____, 105 S.Ct. ____, 83 L.Ed.2d 841 (1985).

In Witherspoon v. Illinois, supra, the Court was concerned with the constitutionality of excusing for cause veniremen who have scruples against the death penalty. The court in essence held a venireman cannot constitutionally be excused for cause if he simply voices a general objection, for religious or other reasons, to capital punishment. The court went on to say:

> "And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings."
> (Text at 20 L.Ed.2d p. 785)

Thus, Witherspoon, says a venireman can be excused for cause if he could not under any circumstances impose a sentence of death. That prospective juror is saying he could not follow the law since the death penalty is a part of the law.

This interpretation of Witherspoon was affirmed in Wainwright v. Witt, supra. The court outlined the proper test to be applied in determining whether a prospective juror could be excused for cause based on his views on the death penalty. The Supreme Court concluded that the standard is whether his views would prevent or substantially impair his performance as a juror. A juror is sworn to follow the law as given to it by the court. The law as given to the jury in a capital sentencing in Florida includes a directive of determining if any of the statutory aggravating circumstances exist; existence of at least one such circumstance is a prerequisite to imposition of a sentence of death. Next the jury is told if aggravating circumstances are found, they must determine if there are mitigating circumstances and, if so, they must further decide if the mitigating circumstances outweigh the aggravating circumstances. A prospective juror who says under no circumstances could he impose death has told the court he could not follow the above procedure.

The procedure of excusing for cause persons who could not impose a sentence of death under any cirucmstance does not differ constitutionally from excluding persons who would automatically vote for death in a first degree murder case. Both prospective jurors have made it clear they could not follow the law. Yet, there has been no suggestion that the State is entitled to keep such people as also representing another "fair cross section" of the community. Are we to have yet another set of alternate jurors who can sit through the guilt/innocence phase but must be excused from sentencing because they would automatically vote for death?

B. SECOND GROUND FOR RELIEF

As his second ground for relief, Petitioner asserts that he was denied the effective assistance of appellate counsel. The United States Supreme Court has recognized that there is a constitutional right of effective assistance of counsel on the first appeal as a matter of right. Evitts v. Lucey, 469 U.S. ____, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). However, even though there is a constitutional right to receive effective assistance of appellate counsel, there is no constitutional duty to raise every non-frivolous issue. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). The failure of appellate counsel to brief issues he reasonably considers to be without merit is not ineffective assistance of counsel. Alvord v. Wainwright, 725 F.2d 1282, 1291 (11th Cir.), cert. denied, 105 S.Ct. 355 (1984). An examination of those claims Petitioner now asserts should have been raised on direct appeal by appellate counsel reveals that, indeed, appellate counsel rendered reasonably effective assistance of counsel. The instant case is inapposite to this Honorable Court's decision in Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985). In Wilson, this Court determined that appellate counsel's performance therein was so deficient as to undermine confidence in the fairness and correctness of the appellate result. Sub judice, there is no doubt as to the fairness and correctness of this Court's decision in Johnson's direct appeal.

1. Permitting the jury to separate during deliberations.

Petitioner claims that he was denied the effective assistance of appellate counsel where appellate counsel did not raise an issue concerning whether the trial court erred by permitting the jury to go home overnight after submission of the case to the jury for deliberation. In his petition at page 27, Petitioner acknowledges that the objection made by

defense counsel to the jury separation was done so on the advice of appellate counsel who was present at the time. Thus, this is not an issue which appellate counsel was unaware of. Therefore, the question becomes whether Petitioner was denied the effective assistance of appellate counsel by virtue of the non-inclusion of this claim in Petitioner's direct appeal.

In support of his proposition, Petitioner relies upon the decision rendered by this Honorable Court in Livingston v. State, 458 So.2d 235 (Fla. 1984). In Livingston, this Court established a "strict rule" that in a capital case the jury must be sequestered after its deliberations have begun. This case, of course, was rendered subsequent to the decision of this Court in Johnson. Therefore, it is necessary to review the law as it existed at the time of Johnson's trial in order to determine whether appellate counsel was ineffective for failure to raise this claim on direct appeal.

The question of sequestration of the jury after jury deliberations had begun was first discussed in this Honorable Court's decision of Raines v. State, 65 So.2d 558 (Fla. 1953). In Raines, as in the instant case, the trial court permitted the jurors to go home overnight after deliberations had begun. However, unlike the instant case, no judicial instructions were given as to communicating with others. This Court concluded that a 15 hour absence under no restraint whatever are circumstances sufficient to release a defendant from his burden of producing evidence of prejudice. Raines, Id. at 560. In the instant case, however, the trial court more than adequately instructed the jurors not to communicate with each other, with a spouse or other family members, or with friends. The jury was further admonished not to read anything or do anything outside the jury room concerning the trial (R.1598-1599). Upon the jury's return early the next morning, the Court inquired as to whether any of the jurors had seen or heard anything which could influence their deliberations

(R.1603-1604). Thus, it is clear that the trial court's activities sub judice materially differ from the circumstances presented in Raines where no instructions as to communication were given.

Inasmuch as Raines is materially distinguishable from the facts presented in the instant case, it is clear that appellate counsel was not ineffective for failing to raise this point as a claim on appeal. As noted above, appellate counsel was responsible for directing defense counsel to object to the failure to sequester the jury. It is unreasonable to assume anything other than that appellate counsel was aware of the issue but chose not to raise same for good reason. The decision to not raise this claim is supported by this Honorable Court's decision in Engle v. State, 438 So.2d 803 (Fla. 1983), a case decided one month after the direct appeal in Johnson. In Engle, this Honorable Court noted the distinctions between the case before it and the decision in Raines:

> [3] The facts in the case sub judice are, however, distinguishable from those in Raines. . . Furthermore, prior to their separation for the evening, the trial judge admonished the jury to neither discuss the case with outsiders, nor read, watch, or listen to any media reports thereon. Unlike in Raines, we are here convinced that appellant's trial was conducted with that degree of fairness and security that the bill of rights contemplates, and do not believe that he has good reason to believe that he was deprived of any fundamental rights. (Emphasis in original)

Engle, at 808. Although the court in Engle notes that trial counsel agreed to the separation of the jury during deliberations, unlike the instant case where a motion to sequester was made, this Court nevertheless relied upon the fact that the jury was properly admonished by the trial judge as to not being influenced by outside sources. Thus, inasmuch as Raines was notable for the lack of trial court instruction as to communication with others, appellate counsel sub judice

could not be considered ineffective for the failure to raise, at best, a colorable issue. Appellate counsel cannot be held to the standard of attempting to predict a future decision of this Court (Livingston) and, in fact, had this issue been raised it is clear that it would have failed based upon this Court's decision in Engle rendered during the same period of time as was the Johnson decision.

There is no language in Livingston to indicate that the rule announced therein would be applied retroactively. Thus, although Petitioner now asserts that this court should, if it finds that appellate counsel was not ineffective, consider the claim on its merits, such a result cannot obtain because of the doctrine of finality. This Honorable Court and the United States Supreme Court have consistently adhered to the finality doctrine. For example, in State Farm Mutual Automobile Insurance Company v. Judges of the District Court of Appeal, Fifth District, 405 So.2d 980 (Fla. 1981), this Honorable Court stated:

> . . . All things must have end, even a district court's power to correct inconsistencies. The reasons for this form the bedrock of Anglo-American jurisprudence: "There must be an end of litigation. Public policy, as well as the interests of individual litigants, demands it, and the rule just announced is indispensable to such a consummation." (citations omitted) (Text at 982)

Similarly, the United States Supreme Court has expressed its concern that the doctrine of finality be adhered to:

> . . . Our trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless post-conviction collateral attacks. To the contrary, a final judgment commands respect.
>
> [6] For this reason, we have long and consistently affirmed that a collateral challenge may not do service for an appeal.

United States v. Frady, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816, 828, Reh. den., 102 S.Ct. 2287 (1982). Therefore, inasmuch as the claim presented was not a fundamental right at the time of Johnson's direct appeal, Engle, supra, at 808, this claim must fail at this time also.

2. Death qualification of capital jurors

Respondent submits appellate counsel cannot be held ineffective for failing to raise as an issue on appeal the matter of death qualification of jurors. Although the issue was raised before the lower court, the case law available at the time of Petitioner's appeal demonstrates this was not a viable issue. Both this Court and the federal courts had rejected Grigsby - type arguments. See, Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Gafford v. State, 387 So.2d 333 (1980); Jackson v. State, 366 So.2d 752 (Fla. 1978); Riley v. State, 366 So.2d 19 (Fla. 1978); Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978).

Counsel cannot be held ineffective for failing to raise an issue he reasonably believed would not entitle the defendant to any relief on appeal. Cf. Jones v. Barnes, supra.

3. Admission of James Smith's testimony re: Petitioner's violent "intentions"

As his final contention regarding whether appellate counsel was ineffective, Petitioner asserts that certain testimony at trial dealt with "future crimes" so as to reveal to the jury Johnson's general predilection for violence. At trial, defense counsel moved for a mistrial (R.1132). The trial court denied that motion (R.1132). The testimony in

question occurred during the direct examination of State witness, James Smith. Smith's testimony which is relevant to the instant claim as set forth as follows:

> Q. What did he say about going to the hospital?
> A. If they sent a little cop, he knew he could take his gun, if he took that big son-of-a-bitch's gun in Lakeland, and he would be home free then.
>
> * * *
>
> Q. What did he say about the hospital?
> A. He said if they sent a little deputy with him to take him to the hospital, if he could take that big dude's gun in Lakeland, he could take that little one's and he'd be home free.

For the reasons expressed below, appellate counsel was not ineffective where he did not argue this claim on appeal.

It must be observed that defense counsel, although moving for mistrial, never did ask for a curative instruction. A motion for mistrial should never be granted in a midst of a criminal trial unless there is an absolute necessity to stop the trial and discharge the jury. Williams v. State, 354 So.2d 112 (Fla. 2d DCA 1979); Dunn v. State, 341 So.2d 806 (Fla. 3d DCA 1977); Kelly v. State, 202 So.2d 901 (Fla. 2d DCA 1967). The proper procedure to follow when remarks are made that are not by their very existence of such an inflammatory nature as to deny a fair trial is to object and move for curative instructions. A mistrial is the remedy when the corrective instruction is denied or inadequate, or when the offense is repeated. Mabry v. State, 303 So.2d 369 (Fla. 3d DCA 1974), cert. denied, 312 So.2d 756 (Fla. 1975). The granting of a motion for mistrial is a matter within the sound discretion of the trial court. Ballard v. State, 323 So.2d 297 (Fla. 3d DCA 1975); Sweetser v. State, 258 So.2d 287 (Fla. 3d DCA 1972); Reis v. State, 148 So.2d 656 (Fla. 3d DCA 1971).

In the instant case, it is clear that Smith's testimony was not offered to show the bad character or propensity of the defendant to commit the crime charged. Rather, the statements

of Johnson as testified to by Smith are corroborative of Johnson's other confessions insofar as deputy Burnham's murder is concerned. In other words, the statements now objected to by Petitioner relate to and are concerned with statements of Johnson admitting to facts surrounding the murder of Burnham. As such, this testimony is certainly relevant as being evidence tending to prove or dispute a material fact. By concerning himself with the "little cop", Petitioner ignores the major substance of the testimony, that is, Johnson's admission that during his murder spree he managed to take deputy Burnham's weapon.

The testimony of Smith obviously did not deal with Williams Rule testimony in that the Williams Rule addresses the question of the relevancy of past criminal conduct. Any discussion as to future intended crimes is purely speculative. Also, had we been dealing with Williams Rule type evidence, inasmuch as the testimony of Smith does not establish all the elements of a crime, the question of admissibility of prior criminal acts would not be present. See Malloy v. State, 382 So.2d 1190 (Fla. 1979). Nevertheless, the State asserts that the statements of Johnson as related by Smith were properly admitted as relevant to establish the fact that Johnson obtained Burnham's gun. This confession was properly admitted.

Inasmuch as no curative-type instruction was requested by trial counsel, and inasmuch as this issue is colorable at best, appellate counsel was not ineffective for not raising this claim on direct appeal.

CONCLUSION

Based upon the foregoing reasons, arguments and authorities, the Petition for Extrordinary Relief and a Writ of Habeas Corpus should be denied. The United States Supreme Court will resolve the Grigsby claim and a review of the record and the brief filed on behalf of Petitioner by appellate counsel reveals that Petitioner received effective assistance of appellate counsel.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

Robert J. Krauss

ROBERT J. KRAUSS
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

Robert J. Krauss for

PEGGY A. QUINCE
Assistant Attorney General

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. mail to Steven H. Malone, Assistant Capital Collateral Representative, University of South Florida - Barboro, 140 7th Avenue, South, Room COQ-216, St. Petersburg, Florida 33701, this 21st day of February, 1986.

Robert J. Krauss

OF COUNSEL FOR RESPONDENT

FILED
SID J. WHITE
FEB 24 1986
CLERK, SUPREME COURT
By _____ Chief Deputy

DEPARTMENT OF LEGAL AFFAIRS
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FLORIDA 32304

JIM SMITH
Attorney General
State of Florida

Please Reply To:
Park Trammell Building
1313 Tampa Street, Suite 804
Tampa, Florida 33602
(813) 272-2670

February 21, 1986

Honorable Sid White, Clerk
Supreme Court of Florida
Supreme Court Building
Tallhassee, Florida 32304

RE: PAUL B. JOHNSON v. LOUIE L. WAINWRIGHT, Secretary Department of Corrections, State of Florida
Capital Case:

Dear Mr. White:

Enclosed please find an original and seven copies of the Response to Petition For Extraordinary Relief and Writ of Habeas Corpus for filing.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

Robert J. Krauss

ROBERT J. KRAUSS
Assistant Attorney General

cc: Steven Malone